No. 15195

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES HANNIFIN, Claimant of One Electronic Pointmaker, Also known as the JOKER MACHINE, Serial Number X550378, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee;

and

JAMES HANNIFIN, Claimant of One Electronic Pointmaker, Also known as the BINGO MACHINE, Serial Number X550518, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

BRIEF OF APPELLEE

Appeals from the United States District Court for the District of Montana, Butte Division.

KREST CYR
United States Attorney
Federal Building,
Butte, Montana;
DALE F. GALLES
Assistant U. S. Attorney
Federal Building,
Butte, Montana;
MICHAEL J. O'CONNELL
Assistant U. S. Attorney
Federal Building,
Butte, Montana;
FRANK M. KERR
Assistant U. S. Attorney
Federal Building,
Butte, Montana
ATTORNEYS FOR APPELLEE,
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Federal Building,
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Assistant U. S. Attorney
Federal Building,
Butte, Montana

ATTORNEYS FOR APPELLEE,
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INDEX

STATUTES AND CASES CITED

APPLICATION OF TITLE 15 U. S. C. A. §1171, ET SEQ.

Two questions were raised by the pleadings in these cases. One, are the Pointmakers gambling devices, by the operation of which a person may become entitled to receive, as a result of the application of an element of chance, money; and two, is there a drum or reel with insignia thereon, which is an essential part of these machines?

As to the first question, the Court had before it the machines and observed that they have the appearance of slot machines. (Exhibits 1, 1A, 2 and 2A.) The Court may also observe the play of the machine, and although technically differing in some respects with a mechanical slot machine, it is obvious that it is the same kind of machine. (Tr. 61, 62, 63.) The Court had an opportunity to hear the machine while being operated. The same sounds as the old-type mechanical slot machine were to be heard. In short, it looked like a slot machine, operated like a slot machine, and sounded like a slot machine, and the testimony of the Government's witnesses, which was not controverted, was to the effect that the claimant, James Hannifin, had stated that all of these machines of which he had knowledge were used as gambling devices, with the possible exception of machines located at the Elks' Club, and as to these, Hannifin stated that he had no information. (Tr. 46.) An Assistant Attorney General of the State of Montana, together with an associate, played or observed the play of numerous of these machines in the City of Butte and vicinity, all of which he

testified were used as gambling devices. The two machines which are here involved were taken from the Eagle Lounge in Butte and Ole Nelson, the bartender of said lounge, testified that winnings were paid off in cash over the bar. (Tr. 61, 62, 63.) In this regard, we wish to point out to the Court that it is not necessary that the machine itself deliver the prize, but only that the person operating the machine may become entitled to receive money. In this regard, we call the Court's attention to page 7 of the Report of Congress, 81st Congress, Second Session, Report No. 2769, page 7, where it is observed:

> "If they (slot machines) are not equipped to deliver money or property mechanically, the winnings, if any, indicated on the machine are usually paid over the counter by the owner of the premises on which such slot machines are operated, or his employees."

which is the situation in this case. While the machine itself did not deliver the money if a win were indicated on the drums or reels on the face of the machine, the player was entitled to receive the money equivalent of those numbers.

An observation of the machine in play, with the accompanying testimony of the Government's witnesses and the stated purpose of Congress in enacting the statute measured by mature men in the light of their experience, leads to the unavoidable conclusion that the machines involved in this case are gambling devices which have been cleverly designed and constructed for the purpose of evading the Laws of the United States. In the Case of *United States* v. *Robert J. Ansani, et al. co-partners doing business as Taylor and Company*, 138 F. Supp. 451, decided in the

Northern District of Illinois on January 26, 1956, the Court holds, in connection with the determination that a Trade Booster is within the purview of the Johnson Act, that a slot machine equipped with a Trade Booster is a gambling device, and not an amusement mechanism. The Trade Booster is an electrical device which when attached to the old-type slot machine made a machine which was very similar in operation to the Pointmakers, in that the attachment of the Trade Booster to the slot machine removed the necessity for the use of coins and the entire machine was remotely controlled, with the Trade Booster attachment. The Court said:

> "The defendants argue that a slot machine is not a gambling device, but an amusement device, once it is attached to a Trade Booster. The short answer to this contention is that a person plays a slot machine for the same reason that he does any other gambling device, and that is, to win a prize in money or property. There is nothing amusing about merely playing a slot machine in order to see what insignia comes up in the reels. Whatever amusement is involved is derived from the expectation of 'hitting the jackpot' and the possibility of winning the jackpot makes a slot machine, altered or unaltered, a gambling device. Indeed, few people would play a slot machine if they knew that, win or lose, there would be no winnings. Furthermore, the legislative history of the instant Act clearly reveals that a slot machine equipped with a Trade Booster is a gambling device and not an amusement mechanism. The defendants run squarely into the legal maxim that one cannot do indirectly that which he is forbidden to do directly."

The Court also stated:

> "An object is that which it is in objective reality. If, in placing a label or name on that object by which

> it later will be known, a word or term is chosen that described that object's accidental qualities, rather than those qualities that the object has of its very essence, then that object does not cease to be that which it is in objective reality merely because those accidental qualities are late removed. The label or name by which that object is known succeeds, by common usage, to mean that which it is in objective reality. Thus, in naming that which was to be known as a 'slot machine,' the word 'slot' describes an accidental quality of that which is now known as a 'slot machine' and does not describe that which a slot machine has of its very essence. It makes little difference, therefore, whether a slot machine has been disslotted or not, as that machine continues to be a slot machine altered or not."

We submit to the Court that the Pointmakers are a mechanical device by operation of which a person may become entitled to receive as a result of the application of an element of chance any money or property; which raises the question as to whether the drums or reels with insignia thereon (here numbers) are an essential part of these machines. Appellants contend "essential" to be the equivalent of "indispensable;" although this construction appears in some dictionaries, the weight of legal authority appears to favor the used of modern interpretations such as "necessary," "beneficial," or something without which the subject matter to which the word applied would be incomplete.

In connection with dictionary definitions, the opinion of Judge Learned Hand, *Cabell* v. *Markham,* 18 F. 2d, *737, 739,* is of interest. Commenting upon the construction of words, he stated:

> "Courts have not stood helpless in such situations; the decisions are legion in which they have refused to

> be bound by the letter, when it frustrates the patent purpose of the whole statute (cases cited). Of course, it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indeces of a mature and developed Jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

The purpose of the statute here in question is to prohibit transportation of gambling devices in interstate commerce. No sympathetic or imaginative discovery is here needed to determine that the legislative intent was to ban interstate shipment of devices such as the "Jokers" or "Pointmakers." To hold that the temporary removal of a part or parts of a device clearly within the purview of the Act causes it to lose its illegal character is nothing short of an invitation to evasion of the law. Thus, to give a restrictive connotation to the word "essential" as used in the Act would be to defeat the very purpose for which it was passed.

The Courts have held that the words "essential" and "necessary" are synonymous, and mean something less than indispensable. In *City of Kalamazoo* v. *Baklema et ux.*, S. C. Mich., 1930, 233 N. W. 325, 326, the Court had under consideration the meaning of the word necessary in connection with the taking of private land for public use. The State Constitution provides that this may not be done without the necessity therefor being first determined. The charter of the plaintiff provided that it might, when

deemed essential, purchase or condemn private property for public use. It was contended that there is a difference between the meaning of the two words and the Court below wrongly used them interchangeably. The Court stated "lexicographers defined 'necessary' as 'essential' and 'essential' as 'necessary'," quoting Chief Justice Marshal in the case of *McCulloch* v. *Maryland,* 4 Wheat, 316, 4 L. Ed 579:

> "Does it (necessary) always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another; to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattaintable. Such is the character of human language, that no word conveys to the mind in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense —in that sense which common usage justified. The word 'necessary' is one of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind received of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several

> phrases. . . . This word, then, like others, is used in various sense; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

In *Robinson* v. *Larue,* C. A. Tenn. 1941, 156 S. W., 2d 359, in construing the word "necessary" as used in the Fair Labor Standards Act held that as used in the Act the word "necessary" did not mean indispensable but meant essential and beneficial.

Another construction of the words "essential parts" is to the effect the essential parts of a building may be said to be those without which, as designed and planned, it would be incomplete. *Peek et al.* v. *Brush* (S. C. of Errors, Conn. 1916, 98 Atl. 561). Thus, it might well be argued that while a brake is essential to the safe operation of an automobile, it is indispensable; that running hot water is necessary to the full enjoyment of modern living but it is not indispensable. The conclusion follows that the reel in the gambling devices in question is not indispensable to its mechanical operation, but is essential to provide the attraction which causes persons to spend money playing it.

That the drums or reels on these Pointmakers were necessary is not subject to argument, because the man who designed the machine stated in his testimony that he did not put any parts in the machine which were not necessary, (Tr. 108, 110), which was further corroborated by the testimony of Mr. Tarbox who stated that the drums or reels were an essential part of these machines. (Tr. 79.) We provided the District Court, with unreported decisions pertaining to this type of machine or wherein the Court makes statements about similar devices. These

are *United States* v. *One Joker Type Slot Machine*, which was decided in the Third Division, Territory of Alaska, where the Court held a Joker Type slot machine to be a gambling device. The case of *United States* v. *Three Trade Boosters,* Civil Action No. 5097, Middle District of of Pennsylvania. In addition, we provided the District Court with a book entitled the "Attorney General's Conference on Organized Crime" which is referred to in the Congressional reports which were also furnished, being Senate Report No. 1482 of the 81st Congress, Second Session, and House of Representatives Report No. 2769, of the 81st Congress, Second Session.

APPLICATION OF RULE 52 (a), FEDERAL RULES OF CIVIL PROCEDURE

This rule provides, in relevant parts:

> "In all actions tried upon the facts without a jury . . . the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Requests for Findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. . . . "

The District Court in this case tried the same on the facts without a jury and filed written findings of fact and conclusions of law directing the entry of an appropriate judgment, wherein the Court found all of the facts necessary for the application of Title 15, U. S. C. A. §1171, and specifically found that each of the Pointmakers "were and are a machine and mechanical device." and that "there was and is as an essential part of each Electronic Pointmaker a drum or reel appearing on the face of each with

insignia thereon, consisting of numerals." and "that by the operation of the said Electronic Pointmakers, a person may become entitled to receive as the result of an element of chance, money."

As this Court stated in *Gamewell Company* v. *City of Phoenix,* 216 F. 2d, 928:

> "The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.) The object of the clause as to the effect of findings is to give to findings the effect which they formerly had in equity. *United States* v. *Gypsum Co.,* 1948, 333 U. S. 364, 395. The aim is to: ' . . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings.' *Graver Tank & Mfg. Co., Inc.,* v. *Linde Air Products Co.,* 1949, 336 U. S. 271, 275."

See also *Lew Wah Fook* v. *Brownell,* 218 F. 2d, 924, and *Carr v. Yokohama Specie Bank, Ltd.,* 211 F. 2d, 251.

UNITED STATES VS. WALTER KORPAN

Appellants have cited in their brief the case of *United States* v. *Walter Korpan,* rendered in the United States Court of Appeals for the 7th Circuit, on September 28, 1956, No. 11669. We submit to the Court that this case is not pertinent because it involves a different kind of machine, the machine in question being a machine more closely resembling a pinball machine, the construction of §4462 of the Internal Revenue Code in the application of the terminology "so-called 'slot' machine" to the machines there in question. The Court did not have before it the application of Title 15, U. S. C. A. §1171, et seq., and whatever was said with reference to it was dicta.

CONCLUSION

We submit to this Court that the Findings of Fact of the District Court are not "clearly erroneous" and that the Electronic machines here involved are gambling devices which were in fact used as such, and that the clever change in the design of the machine which was an obvious attempt to evade the law does not take the machines out of the definitions contained in Title 15 U. S. C. A. §1171, et seq. These machines are suited only for use as gambling devices, and the decision of the District Court should be affirmed.

Respectfully submitted,

KREST CYR,
United States Attorney,
Federal Building,
Butte, Montana;

DALE F. GALLES,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana;

MICHAEL J. O'CONNELL,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana;

FRANK M. KERR,
Assistant U. S. Attorney,
Federal Building,
Butte, Montana,

Attorneys for Appellee,
UNITED STATES
OF AMERICA.